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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re CONSECO INSURANCE CO.
ANNUITY MARKETING & SALES
PRACTICES LITIG.

No. C-05-04726-RMW

CLASS ACTION

This Document Relates To:

NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT

ALL ACTIONS.

JUDGE: Hon. Ronald M. Whyte
DATE: August 12, 2011
TIME: 9:00 a.m.
CTRM: 6 – 4th Floor

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1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on August 12, 2011, at 9:00 a.m., before the Honorable
3 Ronald M. Whyte, in Courtroom 6, 4th Floor of the above-entitled Court, located at 280 South First
4 Street, San Jose, California, Plaintiff Friou P. Jones ("Plaintiff") will and hereby does, through
5 undersigned counsel, move this Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure
6 for a final order and judgment: (1) certifying the Settlement Class; (2) granting final approval of the
7 Settlement Agreement ("Agreement"); (3) directing the entry of Final Judgment; and (4) dismissing
8 the Action (including all individual and Class claims presented thereby) with prejudice.

9 Plaintiff's motion is based on this notice of motion and memorandum, the memorandum of
10 points and authorities in support of attorneys' fees, the declarations of counsel, the Court's file, and
11 such further oral and documentary evidence as may be presented at the hearing on this motion.

12 MEMORANDUM OF POINTS AND AUTHORITIES

13 I. INTRODUCTION

14 The Settlement reached by the parties achieves an excellent result for more than 10,200
15 senior citizens (or their beneficiaries) across the country who purchased deferred annuity products
16 from defendants Conseco Insurance Company, Conseco Services, LLC, and Conseco Marketing,
17 LLC ("Defendants"). Indeed, the Agreement provides members of the Settlement Class valuable
18 economic relief in the form of an Account Value Bonus, Annuitization Bonus, Bonus for
19 Surrendered Annuities and Enhanced Death Benefit.

20 The parties reached this Agreement only after engaging in extensive, arm's-length
21 negotiations under the guidance of a well-respected mediator, the Honorable Edward A. Infante
22 (Ret.) of JAMS. The Agreement fully and fairly resolves the claims of Plaintiff and other similarly-
23 situated elderly annuity purchasers and will eliminate the substantial expense, burdens and risks
24 associated with continued litigation. Additionally, the proposed Settlement compares favorably with
25 class settlements approved in similar cases involving the sale of deferred annuities, appropriately
26 reflects the strengths and weaknesses of the parties' claims and defenses, and provides finality and
27 certainty to Plaintiff, Defendants and all Class Members.

28

Consistent with relevant Ninth Circuit authority, the parties' Agreement should be reviewed pursuant to Rule 23(e) of the Federal Rules of Civil Procedure under "the universally applied standard [of] whether the settlement is fundamentally fair, adequate, and reasonable." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). The Court should examine "the settlement taken as a whole, rather than the individual component parts . . . for overall fairness." *Rodriguez v. West Publ'g Co.*, 563 F.3d 948, 964 (9th Cir. 2009) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

As discussed below, the valuable economic relief attained for Class Members as a result of the Agreement, as well as the complete satisfaction of the requirements of Rule 23, mandates a finding that the Agreement is indeed fair, reasonable and adequate. Further, the proposed Settlement Class meets all the requirements for certification of a settlement class, and the Class Notice has satisfied all of the requirements of Rule 23(c)(2)(B) and (e)(B), as it provides the best notice practicable under the circumstances. Plaintiff therefore moves this Court for a final order and judgment certifying the Settlement Class and granting final approval of the Agreement, directing entry of Final Judgment, and dismissing the Action with prejudice.

II. BACKGROUND OF THE LITIGATION AND SETTLEMENT

A. History of the Proceedings

On April 27, 2007, Plaintiff filed the Second Amended Consolidated Class Action Complaint ("Complaint"), the operative complaint, which asserts causes of action for violations of civil RICO, 18 U.S.C. §1962(b)-(d), Financial Elder Abuse, Cal. Welf. & Inst. Code §15600 *et seq.*, Unfair Competition and False Advertising, Cal. Bus. & Prof. Code §17200 *et seq.*, and Cal. Bus. & Prof. Code §17500 *et seq.*, in connection with the marketing and sale of Conseco deferred annuities to senior citizens. The Complaint alleges that Defendants marketed and sold poorly-performing and illiquid deferred annuities to senior citizens by presenting them with standardized sales materials that misrepresented or otherwise concealed the annuities' true costs and other adverse features. Agreement at 1; Joint Declaration of Theodore J. Pintar and Stephen R. Basser in Support of Plaintiff's Motion for an Award of Attorneys' Fees, Expenses and Service Award, Dkt. No. 217 ("Joint Decl."), ¶6.

1 Defendants deny any and all liability and wrongdoing alleged in the Action and further deny
2 that Plaintiff, or any members of the class he purports to represent, have suffered any damage.
3 Agreement at 1; Joint Decl., ¶¶7, 24-25.

4 Since the filing of the original class action complaint over five years ago, the Action has been
5 aggressively litigated by both sides, as the parties have engaged in substantial motion practice and
6 discovery. Highlighting the hard-fought nature of the litigation, Defendants filed multiple motions
7 to dismiss, resulting in a three-year battle over the sufficiency of the pleadings. Dkt. Nos. 18, 49, 88,
8 103; Joint Decl., ¶7. Defendants finally filed their answer to the Complaint on January 20, 2009.
9 Dkt. No. 155; Joint Decl., ¶7.

10 On June 7, 2010, Plaintiff filed his motion for class certification. Dkt. Nos. 177-182; Joint
11 Decl., ¶9. Defendants filed their opposition to class certification on August 23, 2010. Dkt. Nos.
12 188-194; Joint Decl., ¶9. Both parties submitted the declarations of experts in support of their
13 respective positions. Dkt. Nos. 180, 190-194. The Court continued the deadline for the filing of
14 Plaintiff's reply to allow the parties to engage in settlement discussions. Joint Decl., ¶10.

15 Discovery in this case has been extensive. During the course of the Action, Class Counsel
16 reviewed over 350,000 pages of documents produced by Defendants and third-parties, analyzed
17 extensive actuarial and product data and took the depositions of numerous Conseco executives and
18 employees. Joint Decl., ¶¶11-14. The parties also participated in numerous meet-and-confer
19 conferences and engaged in motion practice to resolve certain discovery issues. *Id.* Moreover, had
20 settlement discussions not occurred, the parties would have likely engaged in extensive expert
21 discovery. *Id.*

22 **B. Mediation and Negotiation of the Settlement**

23 The parties were only able to settle the Action after engaging in intense, arm's-length
24 negotiations that spanned more than two years. Joint Decl., ¶¶15-17. In addition to direct settlement
25 negotiations, the parties agreed to mediation before Judge Infante of JAMS, who assisted them in
26 resolving difficult issues concerning the potential settlement benefits to the Class. *Id.* Under Judge
27 Infante's guidance, the parties worked many hours to reach the terms embodied in the Agreement.
28 Importantly, the parties have conducted their own investigation and evaluation of the relevant law

1 and facts necessary to assess the strengths and weaknesses of Plaintiff's allegations and claim for
 2 damages, as well as Defendants' defenses. *Id.*, ¶¶28-29. Based on these investigations, the parties
 3 independently concluded that entering in the proposed Settlement was in their best interests. *Id.*

4 **III. THE PROPOSED SETTLEMENT CLASS SATISFIES THE** 5 **REQUIREMENTS FOR CERTIFYING A SETTLEMENT CLASS**

6 Strong judicial policy favors settlement of class actions.¹ *Class Plaintiffs v. Seattle*, 955 F.2d
 7 1268, 1276 (9th Cir. 1992). In its Findings and Order Preliminarily Approving Class Settlement,
 8 Directing Issuance of Notice to the Class, and Setting of Fairness Hearing ("Preliminary Approval
 9 Order"), dated April 25, 2011 (Dkt No. 212), the Court provisionally certified the Settlement Class
 10 and "determined the proposed Settlement to be fair, reasonable, adequate and within the range of
 11 possible approval." Preliminary Approval Order, ¶6. The Court also reviewed the notice provisions
 12 of §4 of the Agreement, including the Class Notice itself, and found that mailing the Class Notice to
 13 the last known addresses of the Class Members: (i) "constitutes the best practicable notice under the
 14 circumstances," (ii) "is reasonably calculated to apprise Class Members of the pendency of the
 15 Action and of their right to object to or exclude themselves from the proposed Settlement," (iii) "is
 16 reasonable and constitutes due, adequate, and sufficient notice to all persons entitled to receive
 17 notice," (iv) and "meets all applicable requirements of Rule 23 of the Federal Rules of Civil
 18 Procedure, the United States Constitution, and its Amendments." Preliminary Approval Order, ¶8.
 19 The Court also appointed Plaintiff Jones to serve as Class Representative and the firms of Robbins
 20 Geller Rudman & Dowd LLP ("Robbins Geller") and Barrack, Rodos & Bacine ("Barrack Rodos")
 21 to serve as Class Counsel. Preliminary Approval Order, ¶3.

22 **A. Definition of the Proposed Settlement Class**

23 Plaintiff requests that the Court, pursuant to Rule 23(b)(3) of the Federal Rules of Civil
 24 Procedure, finally certify the Settlement Class, as defined in the Agreement:

25 Any person or trust who has not made a valid request for exclusion from the
 26 Settlement Class and who is, as of the Eligibility Date, or who was at the time of the
 27 Annuity's termination prior to the Eligibility Date, an Owner, as defined in this
 28 Agreement, of an Annuity, or a Beneficiary of a deceased Owner, provided that

¹ Unless otherwise noted, citations are omitted and emphasis is added.

Defendants' records show that one of the Annuity's Owners as of the Eligibility Date is, or one of the Annuity's Owners at the time of termination was: (a) a natural person who was age 65 or older on the Annuity's date of issue; or (b) a trust, and at least one Annuitant was age 65 or older on the Annuity's date of issue; except that, "Class Member," "Class Members," and "Settlement Class," do not include a person or trust: (a) who is or was an Owner of an Annuity: (i) that was issued but not accepted or was returned to the Company as part of the exercise of the free-look provision in the Annuity or was otherwise rescinded; (ii) that was surrendered in full without incurring any Surrender Charge; (iii) that was Annuitized and the Annuity Payments have ceased; or (iv) that was owned by a natural person under age 65, and in which no person age 65 or older had an ownership interest at the time of purchase; (b) who signed a document that released any of the Defendants from any further claims concerning the Annuity; (c) whose rights and claims respecting the Annuity have been finally adjudicated in a court of law; (d) who is or was a member of the Board of Directors, an officer, shareholder or employee of Defendants at any time during the Class Period, as well as the parents, affiliates, legal representatives, attorneys, successors, or assigns of Defendants; (e) who is a judge, justice, or judicial official presiding over the Action or is with the staff or immediate family of such judge, justice or official; (f) who is a person or entity hired to administer the terms of the Settlement; and (g) which is a corporation or legal entity other than a trust or natural person.

Agreement, §1.17.

B. The Settlement Class Satisfies the Requirements for Certification of a Rule 23(b)(3) Settlement Class

The Ninth Circuit strongly encourages the approval of class action settlements and certifying a settlement class is part of that process. *Churchill Village, L.L.C. v. General Elec.*, 361 F.3d 566, 572 (9th Cir. 2004). The Court should finally certify the Settlement Class, as it satisfies all of the requirements of Rules 23(a) and 23(b)(3).

1. The Settlement Class Satisfies Rule 23(a)

Rule 23(a) is made up of four subparts, all of which are met here. First, the Class satisfies numerosity. The Settlement Class includes over 10,200 senior citizens, which is more than sufficient to satisfy numerosity under Rule 23(a)(1). Declaration of Patrice Sexton in Support of Motion for Final Approval of Class Action Settlement, filed concurrently ("Sexton Decl."), ¶4; *see, e.g., Zhu v. Fujitsu Group 401(k) Plan*, No. C-03-1148 RMW, 2004 WL 3252573, at *5 (N.D. Cal. Mar. 3, 2004) (class of approximately 139 members sufficient to satisfy numerosity requirement).

Second, the requirement of commonality under Rule 23(a)(2) is satisfied. "Commonality exists where class members' 'situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief.'" *Wolin v. Jaguar Land*

1 *Rover North Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010); *see also Wal-Mart v. Dukes*, ___ U.S.
 2 ___, 131 S. Ct. 2541, 2551, L. Ed. 2d 374 (2011) (“Commonality requires the plaintiff to demonstrate
 3 that class members ‘have suffered the same injury.’”). Finding that commonality should be
 4 construed “permissively,” the Ninth Circuit in *Hanlon* explained: “The existence of shared legal
 5 issues with divergent factual predicate is sufficient, as is a common core of salient facts coupled with
 6 disparate legal remedies within the class.” 150 F.3d at 1019. Here, the claims of Plaintiff and the
 7 other Class Members arise out of Defendants’ alleged scheme to market and sell Conseco deferred
 8 annuities to senior citizens, using standardized written sales materials that misrepresented and
 9 concealed those annuities’ high costs, poor performance and illiquidity. Plaintiff’s claims for
 10 economic and injunctive relief are brought on behalf of all senior citizens in the same or similar
 11 situation, and likewise those claims have been settled on terms that are identical for Class Members
 12 in the same or similar circumstances. Commonality is therefore satisfied.

13 Third, the related requirement of typicality under Rule 23(a)(3) is met. Typicality focuses on
 14 the relationship of facts and issues between the class and its representative. 1 William B.
 15 Rubenstein, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, §3:13 (4th ed. 2002).
 16 Claims of the class representative need not be substantially identical to the absent class members; it
 17 is enough if they are reasonably coextensive. *Hanlon*, 150 F.3d at 1020. As detailed in the
 18 Complaint, Plaintiff and Class Members allege the same illegal practices and claims, all arising from
 19 the same alleged overarching fraudulent scheme to market and sell Conseco annuities. Plaintiff
 20 would have demonstrated his claim and injury using the same common evidence of the claims and
 21 injuries suffered by the Settlement Class. This common evidence includes the standardized written
 22 sales materials and annuity contracts issued by Defendants, Defendants’ own actuarial and product
 23 documents, and expert testimony. Because Plaintiff’s claims are coextensive with the claims of all
 24 other seniors in the Settlement Class and can be proven with the same overarching evidence, the
 25 requirement of typicality is satisfied.

26 The fourth and final requirement of adequacy under Rule 23(a)(4) is also satisfied. To
 27 determine adequacy, the Ninth Circuit looks to: (1) the absence of any conflict between the named
 28 plaintiffs and class counsel, on one hand, and the class members, on the other hand; and (2) whether

1 the named plaintiffs and class counsel will vigorously prosecute the action on behalf of the class. *In*
 2 *re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). “To satisfy constitutional due
 3 process concerns, absent class members must be afforded adequate representation before entry of a
 4 judgment which binds them.” *Hanlon*, 150 F.3d at 1020. Here, there is no conflict of interest
 5 between Plaintiff and the Class. Each Class Member will benefit identically or similarly, according
 6 to their situation and circumstances, as a result of the proposed Settlement.

7 Moreover, the Court has observed Class Counsel’s vigorous prosecution of the Action in
 8 motion practice both on procedural issues and on the merits. *See Hanlon*, 150 F.3d at 1022. Class
 9 Counsel have proven to be capable, efficient and expeditious. *See In re Emulex Corp. Sec. Litig.*,
 10 210 F.R.D. 717, 720 (C.D. Cal 2002) (court evaluating adequacy of counsel’s representation may
 11 examine “the attorneys’ professional qualifications, skill, experience, and resources [and] the
 12 attorneys’ demonstrated performance in the suit itself”). Class Counsel’s extensive investigation,
 13 persistent litigation efforts, and successful negotiation of this Settlement demonstrate a high level of
 14 representation that readily meets the standard of adequacy.

15 **2. The Settlement Class Satisfies Rule 23(b)(3)**

16 In addition to meeting the requirements of Rule 23(a), the Settlement Class satisfies the
 17 predominance and superiority requirements of Rule 23(b)(3). *Hanlon*, 150 F.3d at 1022. “To
 18 qualify for certification under [Rule 23(b)(3)], a class must satisfy two conditions in addition to the
 19 Rule 23(a) prerequisites: common questions must ‘predominate over any questions affecting only
 20 individual members,’ and class resolution must be ‘superior to other available methods for the fair
 21 and efficient adjudication of the controversy.’” *Id.* Rule 23(b)(3) looks to “whether proposed
 22 classes are sufficiently cohesive to warrant adjudication by representation.” *Id.*

23 In approving a nationwide settlement class, the Ninth Circuit stated in *Hanlon* that
 24 certification under Rule 23(b)(3) “is appropriate ‘whenever the actual interests of the parties can be
 25 served best by settling their differences in a single action.’” *Hanlon*, 150 F.3d at 1022. “[A]lthough
 26 some class members may possess slightly differing remedies based on state statute or common law,
 27 the actions asserted by the class representatives are not sufficiently anomalous to deny class
 28

1 certification.” *Id.* “[T]he idiosyncratic differences between state consumer protection laws are not
2 sufficiently substantive to predominate over the shared claims.” *Id.*

3 Here, a common nucleus of facts and legal claims dominates the litigation. This case falls
4 squarely within the category of cases traditionally found suitable for class certification because it is
5 based on a centrally orchestrated fraudulent scheme to sell deferred annuities through the use of
6 uniformly misleading sales documents. *See Negrete v. Allianz Life Ins. Co.*, 238 F.R.D. 482, 496
7 (C.D. Cal. 2006) (certifying annuity class action based on misrepresentations in company’s
8 standardized sales materials). Indeed, the Settlement is very similar to the class action settlements
9 that were finally approved in *In re Midland Nat’l Life Ins. Co. Annuity Sales Practices Litig.*, MDL
10 No. 07-1825 CAS(MANx) (C.D. Cal.) (“*Midland*”), and *Negrete v. Fidelity & Guar. Life Ins. Co.*,
11 No. CV-05-6837-CAS(MANx) (C.D. Cal.) (“*F&G*”), both of which likewise involved the sale of
12 costly, poorly performing and illiquid deferred annuities to senior citizens. Schemes predicated on
13 centrally orchestrated frauds, “especially frauds predicated upon documents,” are traditionally found
14 “suitable for class action treatment.” *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 564 (E.D.
15 Va. 2000). Predominance in this case is readily demonstrated.

16 Further, the class resolution here is superior to “other available methods for the fair and
17 efficient adjudication of the controversy.” *Hanlon*, 150 F.3d at 1023. In considering the
18 “superiority” factors under Rule 23(b)(3), the Court is “to focus on the efficiency and economy
19 elements of the class action so that cases allowed under subdivision (b)(3) are those that can be
20 adjudicated most profitably on a representative basis.” *Zinser v. Accufix Research Inst., Inc.*, 253
21 F.3d 1180, 1190 (9th Cir. 2001).

22 In this instance, Plaintiff seeks certification of a Settlement Class to resolve federal and state
23 law claims that seek recovery of economic damages arising out of Defendants’ marketing and sale of
24 deferred annuities, which were allegedly burdened with high costs and other adverse features. It is
25 neither economically feasible nor judicially efficient for over 10,200 senior citizens to pursue their
26 claims against Defendants on an individual basis. Moreover, manageability, even if problematic in a
27 litigation context, is not an issue in the context of a class settlement. The Supreme Court has
28 explained that a settlement class need not be manageable as a trial class action in order to be certified

as a settlement-only class. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Accordingly, as all of the requirements of Rules 23(a) and 23(b)(3) are met, this Court should finally certify the Settlement Class.

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE FINALLY APPROVED

A. Applicable Legal Standard for Final Approval

Rule 23(e) provides that the “claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e). The Court may approve a settlement to the extent that it binds class members, “after a hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *see also Officers for Justice*, 688 F.2d at 625 (a class action settlement should be reviewed under “the universally applied standard [of] whether the settlement is fundamentally fair, adequate, and reasonable”).

Settlements of complex class actions prior to trial are strongly favored. *See Churchill Village*, 361 F.3d at 576. Settlements are particularly favored “in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.” *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995). As the Ninth Circuit explained in *Hanlon*:

Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026. The Ninth Circuit consistently has applied this non-exclusive list of factors to assess whether, taken as a whole, the settlement is fair. *See, e.g., Churchill Village*, 361 F.3d at 575-76.²

² Because the settlement factors are non-exclusive, discussion of those factors that Plaintiff does not believe to be relevant to this case have been omitted. *See Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

Moreover, where, as here, a proposed settlement has been reached after discovery and arm's-length negotiations conducted by capable counsel, and with the assistance of a well-respected mediator, the settlement should be "presumed fair." *National Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

B. The Terms of the Settlement Are Fair, Reasonable and Adequate

As detailed herein, the Settlement terms are fair, reasonable and adequate in accordance with Rule 23(e). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026.

Under the Agreement, members of the Settlement Class who choose not to be excluded will receive significant financial relief, depending on the status of their Annuity, in the form of either an: (i) Account Value Bonus; (ii) Annuitization Bonus; (iii) Bonus for Surrendered Annuities; or (iv) Enhanced Death Benefit. Agreement, §3.1. These settlement benefits provide direct economic relief to Class Members who have been affected by the alleged adverse features of Defendants' annuities, including their high, embedded costs and illiquidity. Indeed, the Settlement provides an average of \$244 in economic relief for each Class Member. Declaration of Phong L. Tran in Support of Final Approval of Class Action Settlement ("Tran Decl."), ¶4, filed concurrently.

1. Account Value Bonus

A Class Member who is an Owner of an Active Deferred Annuity (*i.e.*, an Annuity that has not been Annuitized, fully surrendered, returned under a "free-look" provision, or otherwise been rescinded, or for which a death benefit has not become payable) as of the Eligibility Date is entitled to receive an Account Value Bonus with respect to that Annuity. Class Members who qualify for the Account Value Bonus will receive a one-time additional interest payment, calculated as the Applicable Percentage of the Accumulation Value added to the Accumulation Value, for each Active Deferred Annuity. Agreement, §3.2 The Applicable Percentage, as used to determine the Account Value Bonus, shall be 0.532% of the Accumulation Value of the Active Deferred Annuity; provided, however, that the Applicable Percentage will be adjusted, if necessary, so that the total of all settlement benefits paid by Defendants pursuant to this Agreement will be no more or no less than

the amount of \$2.25 million (excluding the cost of class notice and settlement administration, Class Counsel Payment and the service award). *Id.*, §1.12.

The additional interest payment, provided through the Account Value Bonus, will be calculated and credited to Class Members' Active Deferred Annuities as of the Implementation Date. The Account Value Bonus is separate and apart from any other guaranteed or non-guaranteed interest rate that may be credited to Class Members under the terms of their Annuity contracts or pursuant to company practice. *Id.*, §3.2

2. Annuitization Bonus

If a Class Member has Annuitized his or her Annuity on or prior to the Eligibility Date, then each remaining Annuity Payment after the Implementation Date will be increased by 2.5%, relative to the amount scheduled to be paid in the absence of this Settlement. Agreement, §3.3.

3. Bonus for Surrendered Annuities

If a Class Member fully surrendered his or her Annuity on or prior to the Eligibility Date and that Annuity was subject to a Surrender Charge, the Class Member will receive a 0.4% increase to the amount of the withdrawal. Agreement, §3.4.

4. Enhanced Death Benefit

Any Annuity of which the Owner, who purchased his or her annuity during the Class Period and passed away on or prior to the Eligibility Date, shall be eligible for an increase of 0.5% to the death benefit amount provided under the Annuity. The Enhanced Death Benefit will be available to the Beneficiary or Beneficiaries of the Annuity, as specified by the terms of the Annuity contract, provided that each Beneficiary qualifies as a Class Member as defined in §1.17 of the Agreement and further provided that each eligible Beneficiary seeking the Enhanced Death Benefit completes, signs and submits to Consecro Services LLC, postmarked no later than 60 days after the mailing of the Class Notice, the Enhanced Death Benefit Claim Form appended to the Class Notice. When an Annuity includes multiple eligible Beneficiaries, the Enhanced Death Benefit will be divided among the Beneficiaries according to their respective interests, as designated in the Annuity. *Id.*, §3.5. Regardless of the number of Beneficiaries designated in an Annuity, the Enhanced Death Benefit will not exceed 0.5% of the death benefit amount provided under the Annuity. *Id.*

1 **5. Other Relief**

2 Additionally, Defendants have agreed to pay Plaintiff \$2,500 as a service award for his
3 participation as the Class Representative.³ Agreement, §§1.20, 8.1. This service award is in addition
4 to any benefits Plaintiff is entitled to receive as a Class Member. Defendants also agree to an award
5 for attorneys' fees and costs not to exceed an aggregate amount of \$750,000. *Id.*, §8.2. As detailed
6 in Plaintiff's Notice of Motion and Motion for an Award of Attorneys' Fees, Expenses, and Service
7 Award ("Fee Brief"), neither the service award nor the attorneys' fees and expenses will in anyway
8 reduce any of the other benefits provided to the Settlement Class. Fee Brief at 2.

9 **C. Under Ninth Circuit Law, the Settlement Warrants Final Approval**

10 By applying the above-enumerated factors set forth by the Ninth Circuit, it is clear that the
11 Settlement should be finally approved.

12 **1. The Strength of the Plaintiff's Case/Risks of Further**
13 **Litigation/Risks of Maintaining Class Action Status**

14 As recognized by this Court in the Preliminary Approval Order, both parties vigorously
15 asserted their positions. Preliminary Approval Order, ¶¶1-4. While Plaintiff believes the Action
16 warrants certification as a litigation class and presents a strong case for liability, Defendants have
17 vigorously contested certification and continue to deny any wrongdoing or liability. Joint Decl.,
18 ¶¶24-26. Plaintiff therefore recognizes the significant risks and uncertainty if the action proceeds to
19 trial. *Id.*

20 **2. The Proposed Settlement Has "No Obvious Deficiencies"**

21 The proposed Settlement "has no obvious deficiencies." *Young v. Polo Retail LLC*, No. C-
22 02-4546 VRW, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006). To the contrary, as described
23 herein, the Settlement favorably compares to other settlements of similar class action claims and is
24 structured to address the alleged shortcomings in Defendants' annuities. Indeed, the Settlement

25
26
27 ³ As the Ninth Circuit recently observed in *Rodriguez*, "[i]ncentive awards are fairly typical in
28 class action cases." 563 F.3d at 958.

1 provides valuable economic benefits, which are specifically tailored to the circumstances of Class
 2 Members and Defendants' challenged conduct. Joint Decl., ¶¶34-36.

3 **3. The Proposed Relief Does Not "Grant Preferential Treatment"** 4 **to the Class Representative**

5 Plaintiff does not receive any unduly preferential treatment under the proposed Settlement.
 6 The service award of up to \$2,500 that Plaintiff will receive under the Settlement is reasonable
 7 compensation for the time and effort he devoted to prosecuting the common claims. This award is not
 8 excessive and does not amount to preferential treatment. *See, e.g., In re CV Therapeutics*, No. C-03-
 9 3709 (SI), 2007 WL 1033478, at *3 (N.D. Cal. Apr. 4, 2007) (awarding \$26,000 to lead plaintiff). Nor
 10 does the proposed Settlement provide excessive compensation to Plaintiff's counsel. The proposed
 11 Settlement contemplates a fee and expense award not to exceed \$750,000. This amount is
 12 considerably *less* than Plaintiff's counsel's lodestar and expenses. *See* Joint Decl., ¶¶33-37, and
 13 supporting declarations of Class Counsel. Moreover, Plaintiff's requested fee award represents
 14 approximately 33% of the \$2.25 million Settlement value, which is within the range of percentage
 15 recovery permitted by the Ninth Circuit. *See* Fee Brief at 17-18. Plaintiff's counsel's proposed fee
 16 award under the Settlement is especially modest in that it encompasses all of counsel's future, post-
 17 approval work necessary to effectuate the Settlement, such as monitoring claims administration,
 18 responding to Class Member inquiries and litigating any appeals. As demonstrated in Plaintiff's Fee
 19 Brief and supporting materials, filed June 9, 2011, Plaintiff's requested fee is appropriate and
 20 reasonable in light of the time, effort and resources expended to resolve this Action and the substantial
 21 settlement benefits that Plaintiff's counsel will have achieved on behalf of Class Members.

22 **4. The Proposed Relief Is Within the "Range of Possible** 23 **Approval"**

24 The proposed Settlement also falls well within the "range of possible approval," as it
 25 provides carefully-tailored economic benefits to all Class Members, without the risk and delays of
 26 continued litigation, trial and appeal. The relief offered under the proposed Settlement specifically
 27 addresses Defendants' alleged deceptive sales and marketing practices, including their alleged mis-
 28 statements and omissions concerning the costs of their annuities and their use of a product spread to
 recover those costs. The proposed Settlement also addresses the surrender penalties and illiquidity

1 allegedly associated with the Annuities. Settlement Class Members will be able to receive Settlement
2 relief in the form of the Account Value Bonus, the Annuitization Bonus, the Bonus for Surrendered
3 Annuities and Enhanced Death Benefit.

4 As noted, the proposed Settlement compares favorably with class settlements approved in
5 similar cases alleging misrepresentations in connection with the marketing and sale of deferred
6 annuity products, such as the *F&G* and *Midland* settlements. See *F&G*, No. 05-6837-CAS (MANx)
7 (C.D. Cal.); *Midland*, MDL No. 07-1825 CAS (C.D. Cal.). In fact, the Account Value Bonus,
8 Annuitization Bonus, Bonus for Surrendered Annuities and Enhanced Death Benefit offered under
9 the proposed Settlement are more beneficial to Class Members than the corresponding relief afforded
10 under other annuity class action settlements. See, e.g., *In re Am. Investors Life Ins. Co. Annuity*
11 *Mktg. & Sales Practices Litig.*, 263 F.R.D. 226 (E.D. Pa. 2009) (automatic annuitization bonus of
12 .4% for contracts in deferral with possible additional bonus up to 2% as part of claims process, with
13 no waiver of penalties for surrendered contracts); *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D.
14 688 (M.D. Fla. 2005) (2% annuitization bonus for annuities with a minimum 10 year payout required
15 and unspecified relief as part of claims process).

16 Importantly, the proposed Settlement recognizes the inherent risks, costs and delay associated
17 with the continued prosecution of this complex class action lawsuit. If this litigation were to proceed
18 to trial, there is no guarantee against a defense verdict. Furthermore, even if a judgment were
19 obtained against Defendants at trial, the recovery might be of no greater value to the Settlement
20 Class and indeed might be substantially less valuable than the proposed Settlement. And, even if
21 Plaintiff ultimately prevailed, it could be years before Class Members would receive any recovery,
22 given the likelihood of appeals. The proposed Settlement is the best vehicle to assure that Class
23 Members receive the relief with respect to the challenged conduct in a prompt and efficient fashion.
24 Joint Decl., ¶¶24-26.

25 Indeed, the price of delay is particularly high in this litigation because it was brought on
26 behalf of elderly consumers who may not be able to wait years for relief. Thus, although the Parties
27 have already engaged in protracted litigation, continuation of the litigation would be extremely
28 expensive and risky, and in the absence of the proposed Settlement, senior annuity purchasers would

1 have to wait substantially longer before they obtain any relief, even assuming Plaintiff successfully
 2 overcame every obstacle to relief. *Id.*

3 Without question, the Parties worked long and hard to achieve a comprehensive Settlement
 4 that provides valuable and far-reaching benefits for the Settlement Class. *Id.*, ¶¶17, 24-27. There is
 5 no reason to doubt the fairness, reasonableness and adequacy of the proposed Settlement, which is
 6 surely within the range of possible approval.

7 **5. Amount Offered in Settlement**

8 The terms of the Agreement meet the standard for “overall fairness.” *See Hanlon*, 150 F.3d
 9 at 1026. Class Members will receive the same type of relief that they could seek in trial, and
 10 possibly more than they would receive if they proceeded with litigation. Indeed, the Settlement
 11 provides each Class Member, on average, an estimated \$244 in economic relief. Tran Decl., ¶4. In
 12 addition, the Parties have agreed to a Release that is properly tailored to this case and is fair and
 13 reasonable. The definitions and terms of the Release are set forth more fully in the Agreement. *See*
 14 Agreement, §§7.1-7.4.

15 **6. The Settlement Is the Product of Prolonged Litigation and** 16 **Serious, Non-Collusive Negotiations**

17 The Court is familiar with the long and adversarial history of this case. The parties only
 18 agreed to the terms of the Settlement after conducting substantial fact investigation, discovery, and
 19 expert consultations, and litigating the merits of Plaintiff’s claims, including motions to dismiss and
 20 class certification. Joint Decl., ¶¶5-21, 24-27. It is not a case in which the lawsuit was filed and the
 21 proposed Agreement was presented quickly. *Id.* After five years of litigation, both the parties and
 22 the Court are in a position to assess the relative strength of the case, the risks of the uncertainty of
 23 litigation, and the comparative benefits of settling the action prior to trial. *Id.*, ¶¶24-27. Thus, the
 24 progress of the litigation, including the amount of discovery completed, favors final approval of the
 25 Settlement.

26 Additionally, the informed, arm’s-length settlement negotiations demonstrate the fairness of
 27 the Settlement. *Id.*, ¶¶15-21, 24-27. “A settlement following sufficient discovery and genuine
 28 arm’s-length negotiation is presumed fair.” *Nat’l Rural Telecomm. Coop.*, 221 F.R.D. at 528. As in

1 *Hanlon*, “[t]here is no evidence to suggest that the settlement was negotiated in haste or in the
 2 absence of information illuminating the value of plaintiff’s claims.” 150 F.3d at 1027. To the
 3 contrary, the mediation process conducted with the assistance of Judge Infante, discussed above,
 4 validates the non-collusive nature of the Settlement. *See Adams v. Inter-Con Sec. Sys., Inc.*, No. C-
 5 06-5428 MHP, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007) (“The assistance of an
 6 experienced mediator in the settlement process confirms that the settlement is non-collusive.”).

7. The Reaction of Class Members

8 The overwhelmingly positive reactions from Class Members to the Settlement further
 9 supports final approval. As of July 5, 2011, the Objection and Opt-Out Deadline, the parties have
 10 received only 32 opt-outs and a **single objection** to the proposed Settlement – out of a Class of over
 11 10,200 people. Sexton Decl., ¶¶4, 8-9.

12 The relatively low number of opt-outs and the single objection to this Settlement compares
 13 favorably to the numbers of opt-outs and objections that other courts have considered when
 14 approving similar settlements. *Rodriquez*, 563 F.3d at 967 (finding favorable reaction by class
 15 members where of 376,301 putative class members who received notice, 54 submitted objections);
 16 *Churchill Village*, 361 F.3d at 577 (finding favorable reaction by class members where of 90,000
 17 putative class members who received notice, 45 submitted objections and 500 submitted opt-outs).
 18 These numbers reflect a positive reaction from the Settlement Class that also weighs in favor of the
 19 fairness of the Settlement. *See Hanlon*, 150 F.3d at 1027 (“the fact that the overwhelming majority
 20 of the class willingly approved the offer and stayed in the class presents at least some objective
 21 positive commentary as to its fairness”).

22 The single objection lodged by Shirlene Tunney is not well-taken and does nothing to
 23 undermine the Settlement. Tran Decl., Ex. 3, Tunney Objection. Ms. Tunney does not object to the
 24 fact of, or the structure of, the Settlement; rather, she believes she should receive more than the
 25 proposed 0.4% bonus for her surrendered annuity. *Id.*, Ex. 3, Tunney Objection. This objection is
 26 tantamount to complaining that the Settlement should be “better,” which courts have long held is not
 27 a valid objection. *Hanlon*, 150 F.3d at 1027. Ms. Tunney does not recognize that settlements, by
 28 their very nature, are the product of compromise and therefore tend to offer less than a full recovery.

1 *See also EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985). Ms. Tunney's
2 objection is therefore insufficient to block final approval of the Agreement.

3 **V. THE IMPLEMENTED NOTICE PROGRAM PROVIDES ADEQUATE**
4 **NOTICE TO THE SETTLEMENT CLASS**

5 Pursuant to the Court's Order, the Settlement Administrator, CNO Services, LLC ("CNO"),
6 implemented the approved Class Notice program, as detailed in the Sexton Declaration. On May 16,
7 2011, the Administrator sent Class Notice to 10,204 Class Members by first-class, pre-paid mail to
8 the last known address based on Defendant's records. Sexton Decl., ¶4. Of the 10,204 direct notices
9 that CNO mailed, only 568 were returned as undeliverable. One was re-sent after CNO located the
10 updated address. *Id.*, ¶5. Thirty-eight notices were returned with a forwarding address, which CNO
11 re-mailed to the addresses provided. *Id.* CNO staffed and continues to staff a toll-free number
12 established to field and respond to questions from Class Members regarding the Agreement, the
13 process by which to submit a claim for the Enhanced Death Benefit, and objection and exclusion
14 procedures. *Id.*, ¶6.

15 **A. The Class Notice Provided the Best Practicable Notice, Including**
16 **Direct Notice, to All Identifiable Settlement Class Members**

17 The Class Notice satisfies the requirements that the notice be "reasonably calculated, under
18 all the circumstances, to apprise interested parties of the pendency of the action and afford them an
19 opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.
20 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). In its Preliminary Approval Order, the Court
21 approved the Class Notice as the best practicable notice under the circumstances. Preliminary
22 Approval Order, ¶8. The Court also authorized the parties to establish the necessary means to
23 administer the Settlement in accordance with the terms of the Agreement. *Id.*, ¶6. Thereafter, the
24 Settlement Administrator, under the guidance of the Parties, sent out the Class Notice, which
25 approximately 94.5% of the potential Settlement Class received the Notice Package. This is more
26 than sufficient. *See, e.g., In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1110-11 (10th Cir. 2001)
27 (Rule 23 and due process satisfied where 77% of class members received notice of settlement).
28

B. The Class Notice Adequately Informed Settlement Class Members of the Settlement

Further, the substance of the Class Notice satisfies Rule 23(c)(2)(B). To provide adequate notice of a class-action settlement, the notice should “generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill Village*, 361 F.3d at 575. In addition, Rule 23(h)(1) requires that notice of Class Counsel’s request for attorneys’ fees must be “directed to class members in a reasonable manner.” Fed. R. Civ. P. 23(h)(1). The Class Notice provides all of the requisite information.

Here, the Class Notice “clearly and concisely state[s] in plain, easily understood language” the nature of the action, the definition of the class certified, the class claims, issues and defenses, that a Class Member may enter an appearance through an attorney if he or she so desires, that the Court will exclude anyone from the Class who requests exclusion, the time and manner for requesting exclusion, and the binding effect of a class judgment on members under Rule 23(c)(3). Agreement, Exhibit B. Further, the Class Notice appropriately informed Settlement Class Members of the terms of the Agreement, the maximum counsel fees and expenses that may be sought, and it explained that objectors would have an opportunity to be heard at the Fairness Hearing. *Id.* The Notice adequately and fairly apprises Class Members of the Settlement and their options with respect thereto.

C. The Class Notice Program Adequately Explained the Procedures to Request Exclusion or to Object

Notice of a class action settlement should alert class members of the procedures to request exclusion or to object. *See Manual for Complex Litigation* (“Manual”), §§21.312, 21.633 (4th ed. 2004). The Class Notice here specifically explains what it means to opt out and how one excludes oneself from the proposed Settlement. Agreement, Exhibit B. The Class Notice also advises that it must be written and it includes the necessary information to include in the written request. *Id.* It further informed Class Members that they will be given an opportunity to be heard at the Fairness Hearing if they object to the settlement in writing. *Id.* Hence, the Class Notice provided to the Settlement Class fully apprised the Settlement Members of the procedures to request exclusion or to object.

D. The Class Notice Program Adequately Informed the Settlement Class Members of the Final Fairness Hearing

Notice of a Final Fairness Hearing should inform the class that they can present their views on the settlement, as well as present arguments for and against the settlement, when the Court addresses the fairness, reasonableness, and adequacy of a proposed settlement. *See* Manual, §§21.633, 21.634. Here, the Class Notice informed Class Members of the details of the Final Fairness Hearing – that it will be held on August 12, 2011 (unless continued) with the precise address. Agreement, Exhibit B. As noted above, the Class Notice informed the Members that if they wanted to be heard, whether in person or by counsel, they needed to file a timely written objection in compliance with the Class Notice. *Id.* The Class Notice also provided a toll-free number at the bottom of each page for putative members to call with questions. *Id.* As such, the Court can conclude that the Notice adequately notified the Settlement Class Members of the Final Fairness Hearing to be held before the Court.

VI. CONCLUSION

For the reasons set forth in detail above, Plaintiff respectfully moves the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for a final order and judgment: (1) certifying the Settlement Class; (2) granting final approval of the Agreement; (3) directing the entry of Final Judgment; and (4) dismissing the Action (including all individual and Class claims presented thereby) on the merits with prejudice.

DATED: July 26, 2011

Respectfully submitted,

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DATED: July 26, 2011

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Class Counsel

ECF CERTIFICATION

The filing attorney attests that he has obtained concurrence regarding the filing of this document from the signatories to this document.

Dated: July 26, 2011

By: s/ Theodore J. Pinter
THEODORE J. PINTAR

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2011, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 26, 2011.

s/ Theodore J. Pintar

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

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